Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-1716

HARRY NEIL KELLY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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The petitioner, Harry Neil Kelly, respectfully requests that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals entered on.

OPINIONS BELOW

On February 20, 1976, petitioner was found guilty by a jury. He was sentenced to one to three years and is still free on bond pending appeal. The statutes involved are Title 18 U.S.C. § 371 and § 2314. On May 10, 1978, the appeal was denied. This petition followed.

JURISDICTION

This Court has jurisdiction because this writ is filed within 30 days of the final appellate decision.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it refused to declare a mistrial after granting a motion for judgment of acquittal on the co-defendant and petitioner was unable to subpoena an exculpatory witness?

2. Whether there was sufficient evidence to justify the case going to the jury and cumulatively does the newly discovered evidence coupled to the lack of evidence before justify a remand, hearing, and trial?

STATEMENT OF THE FACTS

In 1969, an offshore mutual fund, Allied Fund for Capital Appreciation (hereinafter A.F.C.A. or the Fund) was legally chartered and incorporated in Panama (TR. 371), and established its headquarters in Munich, Germany. (TR. 471). The Fund would operate by taking consideration from investors and issuing shares of A.F.C.A. in return. (TR. 182). This Fund maintained broad privileges in how the money should be invested on behalf of its shareholders. (TR. 184). The actual purchase of A.F.C.A. shares were effected through securities brokers throughout the world who would then funnel the money into several exclusive dealers located in Switzerland, Lichenstein, and Germany. A.F.C.A. and these exclusive dealers, Global Distributors, Select Distributors, Select Transfers Ltd. *et. al.* were operated and controlled by the same cast of characters, C. Bennett, Nicholas Gravestyn and Eleanor Smith. (TR. 70, 71 and 539, 40).

From the fund's inception, these individuals held complete control over the purse strings and could withdraw money or assets held by the Fund and the exclusive dealers (TR. 540, 584); whereas, the petitioner

never had any control over the Fund's assets. (TR. 544).[1] Those who had control abused the power and manipulated the assets to their own advantage often without consulting each other, as was related by the A.F.C.A. auditor. (TR. 593, 6). In fact, C. Bennett would remove A.F.C.A. funds and send them to his brother in Canada (TR. 605), and did take other A.F.C.A. funds and transferred them for use in yet another enterprise, Midas, (TR. 741) which was controlled and operated by Bennett. (TR. 741). Director Eleanor Smith commingled the funds of A.F.C.A. and the dealership she controlled (TR. 629) exacted for her personal use. (TR. 659). Even legal counsel for the Fund could not resist the temptation to deal with A.F.C.A. funds, when he unilaterally issued $230,000 to American Express in 1970. (TR. 648). Again, the auditor knew this from personal knowledge, that the payment of $230,000 was made without authorization, and from A.F.C.A. (TR. 650). The appellant, when first appraised of the unauthorized American Express pay off, blanched and became very upset (TR. 649, 50), and maintained that the whole transaction was a great impropriety. (TR. 649). The petitioner made this feeling known to one of the trinity, Gravesteyn. (TR. 649).

The base line of the auditors testimony being that the directors individually looted the funds they controlled and A.F.C.A. (TR. 652-59).

There were sums of money held by A.F.C.A. in several banks (TR. 694 and 1322) and that only trinity of directors had authority to withdraw the funds from the several banks. (TR. 695). These funds were incorrectly administered by these directors. (TR. 710).

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[1] The issue of control of the A.F.C.A. fund will be briefed *infra*.

Throughout the testimony, those closest to the fund maintained that the petitioner did not have knowledge of the clandestine looting occurring in Europe (TR. 703), and that his sole role in A.F.C.A. business was that of advisor. (TR. 702-1281).

Further, the petitioner did not have control over A.F.C.A. disbursements, and *never* issued a check or signed a check for A.F.C.A. (TR. 644), nor did he have any authority at any of the banks to withdraw funds (TR. 1323), and neither was the petitioner involved with any of the exclusive dealers in A.F.C.A. shares. (TR. 1341).

The government relies primarily upon one witness, Schreiber, to establish their case against the petitioner and his co-defendant, who was released from the case upon the judge granting a motion for judgment of acquittal. (TR. 1492, 93). The major government witness against the defendant and Ponsoldt, is a manifestly weak character with several flaws, and one whose testimony resembles the chameleon, in that, it changes colors depending upon circumstances and surroundings. A person whom, per force, even the government admits is most likely to initiate a stock swindle. (TR. 1723-24).

Schriber testified to a myriad of things at different points in time, most, incongruous with each other, or at a very minimum, controverted by subsequent witnesses.

Schreiber, stated that he saw the petitioner and another, Pitman, together in June 1970, falsely listing various securities in the A.F.C.A. prospectus. (TR. 90, 91). Pitman, an accountant for over twenty years (TR. 1616), was engaged by the petitioner to check

A.F.C.A. accounts (TR. 1620), but the books were never tendered for his inspection (TR. 1627), because the trinity refused. (TR. 1628). Pitman even advised the petitioner, in early 1970 to withdraw from A.F.C.A. (TR. 1629). As to Schreiber's allegations, Pitman denied ever engaging in the conduct described, and to his knowledge neither had the petitioner. (TR. 1623, 24).

Schreiber also stated that the petitioner signed the name of Karl Jaeger to certain A.F.C.A. shares (TR. 123-24) (Karl Jaeger—the nominee of the fund as a person authorized under Panamian law to issue shares (TR. 213) tendered to him. This statement was given even though he did not see the signing. (TR. 307, 313). An expert document examiner compared the petitioner's signature and the signature on the shares and concluded that the signature was not that of the defendants. (TR. 1559, 64).

Schreiber stated that the petitioner placed ads in the Herald-Tribune, a financial paper, which quoted the funds selling price per share (TR. 214), albeit he never saw the petitioner place the ads. (TR. 214). Yet, the attorney for the fund stated that C. Bennett had something to do with placing the ads in the Herald-Tribune (TR. 1324); and the auditor of the fund stated, that the trinity definitely placed the ads. (TR. 546). No mention of the petitioner as being responsible for these ads by anyone intimately involved with the fund in Europe, and the Herald-Tribune is a paper published in Europe ,where the directors of A.F.C.A. had their headquarters.

The main government witness often took both sides of the same question, for example, when asked if the

petitioner ever expressed that A.F.C.A. was a fraud, Schreiber responded on 23 May 1973 that the petitioner never expressed that A.F.C.A. was a fraud. (TR. 216). At trial Schreiber stated that the petitioner did state it was fraud. (TR. 215).

At trial, witness Schreiber stated that the assets of A.F.C.A. were handled by the petitioner, (TR. 270) which is a very disputible statement and can not be reconciled with what other witnesses closer to A.F.C.A. have stated; but even Schreiber said as much on 1 June 1973 to government's agents, when he said C. Bennett handled the bulk of the assets. (TR. 278). Further, on 11 June 1973, Mr. Schreiber named all the persons who used the funds of A.F.C.A. for federal agents (TR. 265, 66), and this list did *not* include the petitioner. Again, in one breath he would state the petitioner took no consideration for A.F.C.A. shares (TR. 203), and yet on 23 May 1973, he made a contrary statement. (TR. 203). He stated that he inspected A.F.C.A.'s books (TR. 187-89) and it revealed that the petitioner did not intertrade with A.F.C.A. assets, he contradicts himself (TR. 283) later on in his testimony.

The main government witness had other problems. His testimony came as a result of a deal worked out which would grant Schreiber immunity and earn him an early release from his one year sentence (TR. 350-70) which he earned by pleading.

The directors of A.F.C.A. looted the funds (TR. 652-59). The petitioner was not a director, merely as advisor (TR. 652-59), the petitioner was not a director, merely an advisor (TR. 702, 1281), without any au-

thority to control or manipulate the assets (TR. 1323) of the A.F.C.A. This major shortcoming, coupled with the petitioner's apparent lack of knowledge that looting was occurring in Europe (TR. 703), makes him an unlikely conspirator, and less palpably, the devisor of the scheme to defraud by using "worthless" A.F.C.A. stock; especially when large sums of money were at one point extant and clandestinely diminished, without the appellant's participation or knowledge.

The Bloomfield exchange was initiated, transacted and consumated without the merest participation of the petitioner.

In early June 1970, the Vice President of Acquisitions for Bloomfield, Robert Freund, met Ponsoldt in Miami (TR. 864) to discuss an exchange of assets. Ponsoldt desired to arrange for the exchange of 200,000 shares of A.F.C.A. (TR. 865), for 600,000 shares of the financially beleaguered Bloomfield. (TR. 946-47). The transfer of A.F.C.A. stock was through Die Firma Besenbruch, a corporation owned by Ponsoldt. (TR. 974-75). Ponsoldt stated that the value of A.F.C.A. shares tendered was $2,400,000 (TR. 867) and that the portfolio of investments comprising A.F.C.A. assets were "Blue chip" stock, listed on the New York Stock Exchange (TR. 868), valued at $20,000,000. (TR. 868). Following this initial period of negotiation, a second meeting transpired on 27 or 28 June 1970, at the Brilund Yacht Club, Bahama. (TR. 1057). According to Mr. Bloomfield, third parties contacted the Bloomfield organization regarding the subject transaction, not Ponsoldt. (TR. 1057).

Subsequent to the Bahamas meeting, attorneys for Bloomfield and Ponsoldt met in Miami to memoralize

the negotiations in a contract. At no time was a representative of A.F.C.A. present during the negotiations. (TR. 1088, 89). The contract contained a clause which recited that the A.F.C.A. shares were restricted, and could not be redeemed until April 1971. (TR. 1091, 92). This was confirmed by Bloomfield personally when he went to Germany and consulted with A.F.C.A. officials. (TR. 1091, 92). Ponsoldt related that these restrictions were not binding upon Bloomfield (TR. 875, 977), and over Bloomfield's attorneys advice, the written restriction was incorporated into the contract. (TR. 875, 976, 1212, 1213) (Contract restrictions on redemption are at TR. 1232). On 9 October 1970, Ponsoldt was made President of Bloomfield and Chairman of the Board of Directors. (TR. 1069). After the exchange of assets and prior to 4 November 1970 meeting, the Bloomfield organization had grave problems redeeming the A.F.C.A. shares, therefore the 4 November meeting in Miami was held. This meeting represents the first appearance of the petitioner, and Mr. Freund states that the petitioner did not participate in the negotiations. (TR. 885). Mr. Bloomfield states the petitioner never held himself out as the head of A.F.C.A. The petitioner did tell Mr. Bloomfield to contact A.F.C.A. in Europe to determine if the fund would redeem the share in spite of the restrictions. (TR. 1100, 1174). The petitioner's sole contribution to the 4 November meeting was to inquire if Bloomfield would take .50 on the dollar. (TR. 885). It is interesting, if not at odds with the government's assertion of a fraud or scheme, exchange of worthless stock, that the A.F.C.A. offered a four million dollar loan to Bloomfield while negotiations for the shares redemption were still viable. (TR. 1362).

ARGUMENT

I.

The Court Erred In Denying The Mistrial Motion re The Sudden Absence Of A Key Witness.

It was error for the Trial Judge to grant co-defendant's Ponsoldt's Motion for Directed Verdict of Acquittal (T. 1492) without granting a continuance so that petitioner could subpoena for his defense acquitted co-defendant, Ponsoldt. In *United States* v. *Roca-Alvarez,* (CCA 5) 415 F.2d, 843, this Court held it not to be error not to grant a continuance when there was nothing in the record to indicate that defendant wished to call co-defendant in his behalf. The Court held in this case that a subpoena instanter should have been used to require attendance of the witness. Petitioner attempted to have acquitted co-defendant, Ponsoldt, subpoenaed and such was brought to the attention of the Trial Judge. (T. 1510, 1523, 1557, 1558, 1652, 1673, 1675, 1727, and 1770) Counsel moved for a continuance near the end of Petitioner's defense in order that additional time could be allowed to obtain the attendance of Ponsoldt. (T. 1769) The Trial Court denied petitioner's request for continuance, (T. 1771) and the Court took the position that Petitioner could have subpoenaed his former co-defendant while there at the Courthouse. (T. 1770) That a defendant cannot call his co-defendant for the purposes of cross examination is well embodied in American Law, *United States* v. *Ellsworth,* 481 F.2d, 864, as to do such would be in violation of his co-defendant's Fifth Amendment rights. Petitioner's right and opportunity to subpoena his former co-defendant did not mature until co-defendant's acquittal upon which co-defendant immediately left the Courthouse without giving Petitioner

an opportunity to request a subpoena be issued. To what extent any action by the Petitioner would have been fruitful at that time is speculative in view of the policy of the local marshal's office requiring three (3) days notice before a subpoena could be issued. (T. 1557) In *Scott* v. *United States,* 263 F.2d, 398 (1959), the Court held that where a co-defendant no longer in jeopardy had been subpoenaed in the proper fashion, had agreed to be present, that there was no evidence to indicate postponement of trial was sought for delay or that defendant was not surprised at non-appearance of witness, then it was error to deny a continuance under those grounds when the subpoenaed witness did not appear. Petitioner advised the court at the beginning of his defense that he was issuing the subjoena for Ponsoldt (T. 1523) Petitioner later advised the Court on the same day, that the U.S. Marshal's office had refused to accept the subpoena for Ponsoldt from Petitioner's Trial Attorney indicating that they must have at least three (3) days notice prior to any subpoena being served. (T. 1557) This matter was looked into by the Court and apparently the subpoena was issued for Ponsoldt. The next morning Petitioner's Trial Attorney advised the Court that the Marshal's office had not yet located Ponsoldt. (T. 1652) Later in the trial when the government was faced with problems of stipulations of authenticity of evidence the Court commented that it assumed that it was going to be faced with the problem of sending a Marshal out to get Ponsoldt or to postpone the trial. (T. 1673 and 1675) The problem of subpoening Ponsoldt was once again brought to the Court's attention, (T. 1727) and the fact that the trial counsel for Petitioner was reissuing the subpoena for Ponsoldt. Petitioner moved for continuance of the trial until Ponsoldt could be subpoenaed (T. 1769) but such

continuance was denied by the Court. (T. 1770). Appellant contends that the case at bar is similar to *Scott* v. *U.S.,* supra, in that Appellant made every possible effort to implement the machinery of the Court to assure Ponsoldt's attendance as required by *United States* v. *Harris,* 436 F.2d, 775. Petitioner contends that the failure of the Court to grant a continuance until Ponsoldt could be subpoenaed for attendance resulted in actual prejudice to Petitioner's case in that much of the testimony of Schreiber, Bloomfield, Freund and Clapp could have been contradicted and the actual discussions between Ponsoldt and Bloomfield, before the June 28, 1970, meeting could have been developed showing that Bloomfield had actual knowledge that the AFCA shares were restricted before he made any movement in commerce and that Bloomfield agreed not to attempt to redeem the shares prior to April, 1971, *Baker* v. *United States,* (1968) 393 F.2d, 604. Petitioner further contends that the record reflects that the necessary predicate for the granting of a continuance of this sort was there. *Leino* v. *United States,* 1964, 338 F.2d, 164.

II.

The Cumulative Lack Of Evidence At Trial Plus Newly Discovered Evidence Justifies A New Trial.

The evidence adduced at the trial is insufficient to support a conviction of Appellant on Count 1 of the indictment which charged him with the substantive offense set out in 18 U.S.C.A. 2314 in that he, along with Co-Defendant, Ponsoldt, and others entered into a device or scheme to defraud and obtain money or property in the jurisdictional amount from Harry Bloomfield and Bloomfield Building Industries (here-

inafter referred to as BBI). The indictment charges that false representations were made to Harry Bloomfield and BBI, to wit: (a) A.F.C.A. shares were not restricted, (b) A.F.C.A. could be redeemed on seven (7) days notice to the fund, (c) A.F.C.A. was a successful and reputable fund, (d) A.F.C.A. had extensive and valuable assets consisting of stocks listed on the New York Stock Exchange, and (e) 200,000 shares of A.F.C.A. were worth $2,400,000.00. The indicement further alleges that as part of the scheme, A.F.C.A. was organized under the laws of Panama in 1969 and advertised assets valued in excess of $19,000,000.00, that Ponsoldt obtained from Petitioner shares of A.F.C.A. to be used to obtain assets and that Ponsoldt did obtain such assets, and that on June 27, 1970, in the Southern District of Florida, Petitioner and Ponsoldt by fraudulent pretenses caused Harry Bloomfield to be and did transport Harry Bloomfield from Memphis, Tennessee, to Miami, Florida, to defraud him of property valued at more than $5,000.00.

In *Thogmartin* v. *U.S.,* 313 F.2d, 589, 594 (2, 3) the Court stated:

> It is not necessary that it be shown that the transportation was effected by defendant personally. It is enough if the evidence justifies a conclusion that he was a motivating force in the transportation.

But there must be evidence that Petitioner was a motivating force, and here there is none.

In contemplation of the second paragraph of 18 U.S.C.A. 2314, Bloomfield did not move in interstate commerce, but moved in foreign commerce. All paragraphs, except the second paragraph, the paragraph imposing penalties, and the exclusionary paragraph,

provide that the violations named therein involve *interstate or foreign commerce.* However, the second paragraph of the Code Section limits itself to *interstate commerce.* See *Londos* v. *U. S.,* 240 F.2d 1, *Rogers* v. *U. S.,* 334 F.2d 83. and *Charron* v. *U. S.,* 412 F.2d 557. *Charron,* supra, points out that the Petitioner in that case has knowledge that the victim would have to travel in interstate commerce if Petitioner's scheme were to succeed, a scheme whereby Petitioner convinced the victim to travel from Mexico City, Mexico, to Washington State, via Oregon, to pick up $50,000.00 to bring back to the defendant in that case.

Considering element (2) of the crime set out in the second paragraph of 18 U.S.C.A. 2314, there is no evidence that Petitioner was doing anything in execution or concealment of a scheme.

Considering element (4) of the substantive offense, there is no evidence that prior to the movement of Bloomfield from Memphis to Nassau, Petitioner had devised any scheme or artifice or intented to devise same for the purpose of obtaining money or property by means of fraudulent pretenses, representations, or promises.

Indeed, there is no evidence of a scheme or artifice. The government attempted to show such scheme or artifice as outlined in Subsections (a-e) of Section 1 of the indictment. However, the evidence shows, without equivocation, that the A.F.C.A. shares were restricted and that both Bloomfield and Ponsoldt knew it, no one but Ponsold having stated that the A.F.C.A. shares could be redeemed in seven (7) days, a factor over which Petitioner had no control, and that A.F.C.A. was a successful fund as testified to by Cohen

that, at the time of the BBI-A.F.C.A. stock swap, A.F.C.A. paid all of its debts and redeemed all shares ripe and presented for redemption. On the other hand, there is no evidence that the 200,000 shares of A.F.C.A. were not worth $2,400,000.00, Schreiber having testified that the shares were valued at from $10.00 to $12.50 per share. There is neither evidence that the assets of A.F.C.A. did not have a value of $19,000,000.00, nor evidence that A.F.C.A. did not own shares of entities listed on the New York Stock Exchange.

There is no evidence that Harry Bloomfield would not have been able to redeem the 200,000 shares of A.F.C.A. if they had not been restricted. The opinion of Bloomfield's attorney, Clapp, that the restriction did not apply to Bloomfield was a legal opinion upon which Bloomfield relied.

Counsel intends to supplement the argument herein at a later date with evidence to support our contention that the cumulative lack of evidence and newly discovered evidence justify a reversal and remand for a new trial. Said supplemental brief, with the Court's approval, will show clear evidence that the mutual fund which petitioner supposedly bled dry is still worth over one million dollars.

CONCLUSION

Wherefore, it is respectfully requested that the instant Petition for Writ of Certiorari be granted.

Very respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

No.

HARRY NEIL KELLY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent,*

Affidavit of Petitioner for Writ of Certiorari

DISTRICT OF COLUMBIA: ss.:

DISTRICT OF COLUMBIA) ss.:

I, HARRY NEIL KELLY, do hereby attest and swear that the petition for writ of certiorari filed this day by my counsel in the Supreme Court for the United States of America is filed in good faith and with the firm belief that the issues raised by counsel are issues which should necessitate a reversal of my present conviction before the Federal Court for the Southern District of Florida.

/s/ HARRY NEIL KELLY

APPENDIX B

Affidavit of Petitioner's Counsel

I, Kenneth Michael Robinson, hereby attest and swear that I was retained within the past two weeks in this matter and that this Petition is filed in good faith.

/s/ Kenneth Michael Robinson
Kenneth Michael Robinson

Subscribed and sworn to before me this 10th day of May, 1978.

APPENDIX C

A copy of the opinion of the 5th Circuit will be provided in the near future.